

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION**

Larry Dwain Clark,)	
)	
Plaintiff,)	ORDER ADOPTING
)	REPORT AND RECOMMENDATION
vs.)	
)	
McLean County, North Dakota; Don)	
Charging; Dave Peterson; Sharon Fox;)	Case No. 1:08-cv-075
North Dakota Department of Corrections)	
and Rehabilitation; Timothy Schuetzle;)	
Kathy Bachmeier; Bruce Meiers;)	
Morton County, North Dakota; Joyce O.)	
Harnden;)	
)	
Defendants.)	

The plaintiff, Larry Dwain Clark, filed this pro se civil rights action under 42 U.S.C. § 1983 on August 25, 2008. See Docket No. 3. Magistrate Judge Charles S. Miller, Jr. conducted an initial review of Clark's complaint as mandated by 28 U.S.C. § 1915(e)(2). On November 19, 2008, Judge Miller submitted a Report and Recommendation. See Docket No. 8. Judge Miller ordered that the Clerk of Court not cause to be served any of the defendants named in this action until further order of the court. Additionally, Judge Miller recommended the following:

- 1) that Clark's Eighth Amendment claim for damages against the North Dakota Department of Corrections and Rehabilitation be dismissed without prejudice because it is an immune party and cannot be sued for damages;
- 2) that Clark's Eighth Amendment claims against Timothy Schuetzle, Kathy Bachmeier, and Bruce Meiers be dismissed unless within twenty (20) days of the Court acting on the Report and Recommendation, Clark files an amended complaint stating that he is suing Schuetzle, Bachmeier, and Meiers in their individual capacities because otherwise they are immune from suit;
- 3) that the complaint be dismissed without prejudice as to any persons not listed as defendants in either the caption of the present complaint or in the section naming "additional defendants" unless within twenty (20) days of the Court

acting on the Report and Recommendation, Clark files an amended complaint naming these persons in the caption as defendants and, if state employees, states that he is suing them in their individual capacities;

- 4) that Clark's claims against Sharon Fox and Joyce Harnden be dismissed unless within twenty (20) days of the Court acting on the Report and Recommendation, Clark files an amended complaint that states a cognizable claim against them for a violation of federal statutory or constitutional rights and also stating with respect to Fox and Harnden that they are being sued in their individual capacities;
- 5) that Clark's claims against Morton County be dismissed without prejudice for failure to state a claim;
- 6) that Clark's claim against Dave Peterson alleging perjury at trial be dismissed without prejudice because of the defendant's immunity;
- 7) that Clark's conspiracy/due process claims against McLean County, Don Charging, and Dave Peterson be dismissed without prejudice for failure to state a claim because of the bar imposed by the United States Supreme Court in Heck v. Humphrey, 512 U.S. 477 (1994); and
- 8) that Clark's claim against McLean County for failure to investigate be dismissed without prejudice for failure to state a claim upon which relief can be granted.

In addition to the twenty (20) days from the date of this order Clark has been given to file an amended complaint, he was given ten (10) days from service of the Report and Recommendation to file an objection. Clark did not object to the Report and Recommendation. On December 9, 2008, Clark filed a motion for an extension of time to file an amended complaint. See Docket No. 9.

The Court has carefully reviewed the Report and Recommendation, relevant case law, and the entire record and finds the Report and Recommendation to be persuasive. The Court **ADOPTS** the Report and Recommendation (Docket No. 8) in its entirety. As a result, the Court **ORDERS** the following:

- 1) that Clark's claim for damages against the North Dakota Department of Corrections and Rehabilitation be **DISMISSED** without prejudice.
- 2) that Clark's claims against Morton County be **DISMISSED** without prejudice for failure to state a claim.
- 3) that Clark's claim against Dave Peterson alleging perjury at trial be **DISMISSED** without prejudice because of the defendant's immunity.
- 4) that Clark's conspiracy/due process claims against McLean County, Don Charging, and Dave Peterson be **DISMISSED** without prejudice for failure to state a claim.
- 5) that Clark's claim against McLean County for failure to investigate be **DISMISSED** without prejudice for failure to state a claim upon which relief can be granted.

Clark has twenty (20) days from the date of this order to file an amended complaint that does the following: state that he is suing Timothy Schuetzle, Kathy Bachmeier, and Bruce Meiers in their individual capacities; name as defendants in the caption any persons not listed as defendants in either the caption of the present complaint or in the "additional defendants" section and, if state employees, indicate that he is suing them in their individual capacities; state a cognizable claim against Sharon Fox and Joyce Harnden for a violation of federal statutory or constitutional rights and also state that they are being sued in their individual capacities. Because Clark has twenty (20) days from the date of this order to file an amended complaint, the motion for an extension of time (Docket No. 9) is **DENIED AS MOOT**.

IT IS SO ORDERED.

Dated this 15th day of December, 2008.

/s/ Daniel L. Hovland

Daniel L. Hovland, Chief Judge
United States District Court